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No. 80-1543

In the
Supreme Court of the United States
October Term, 1980

STEVEN L. AMDUR,
Petitioner,
vs.
THE CITY OF CHICAGO, a municipal corporation,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

SUPPLEMENTAL BRIEF OF PETITIONER

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ARGUMENT

This Supplemental Brief is filed pursuant to Rule 22(6) of the Rules of the Supreme Court of the United States. Petitioner believes that this Court's decision in *San Diego Gas & Electric Company* v. *City of San Diego,* ..... U.S. ....., 67 L.Ed.2d 551, ... S.Ct. ..... (1981) (No. 79-678, decided March 24, 1981) (hereinafter referred to as *San Diego*), and in particular the dissenting opinion of Mr. Justice Brennan, emphasizes the importance of granting Petitioner's Petition for Writ of Certiorari.

Petitioner's Complaint alleged that certain zoning ordinances enacted by Respondent, the City of Chicago, were arbitrary and capricious and denied him economically viable use of his land, and were therefore in violation of the Fifth Amendment to the United States Constitution.[1] In *Amdur* v. *City of Chicago,* 638 F.2d 37 (7th Cir. 1980) (hereinafter referred to as *Amdur*) the Court of Appeals for the Seventh Circuit held that Petitioner's Complaint failed to state a cause of action under the Fifth Amendment.

The *Amdur* opinion was based almost entirely on the Court of Appeals' interpretation of *Agins* v. *City of Tiburon,* 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980) (hereinafter referred to as *Agins*). The *Amdur* opinion reads, 638 F.2d at 38:

> We further hold, however, that the complaint failed to state a constitutional claim under the recent Supreme Court decision in *Agins* v. *City of Tiburon,* ..... U.S. ....., 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). In that case, the Court held that there was no Fifth or Fourteenth Amendment violation under a remarkably similar fact situation. . . . As in this case, appellants [in *Agins*] had not yet filed an application for a building permit, so the only question [in *Agins*] — and the only question here — was whether the mere enactment of the zoning ordinances constituted a taking. The Court held [in *Agins*] that they did not.

It is difficult to explain the decision without concluding that the Court of Appeals for the Seventh Circuit read, in *Agins,* a new rule of constitutional law — that the enactment of a zoning ordinance cannot, under any set of

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[1] Petitioner's Complaint also alleged that said ordinances denied him equal protection of the laws and were therefore in violation of the Fourteenth Amendment to the United States Constitution.

facts, violate the Fifth Amendment — and that only the arbitrary application of a zoning ordinance by municipal officers, when a building permit is requested, can raise Fifth Amendment questions.

The complainants in *Agins* asked the California courts, and then the Supreme Court, to expand the relief available to victims of unconstitutional zoning ordinances. The right to relief was presumed; the issue was whether the constitution authorized compensation as an alternative, or in addition, to declaratory relief. The California Supreme Court ruled that only declaratory relief was available under the Fifth Amendment (*Agins* v. *City of Tiburon,* 24 Cal.3d 366, 598 P.2d 25 (Cal. S.Ct. 1979)). The issue was not reached by this Court for reasons more procedural than substantive.

The *San Diego* complainants also asked the California courts, and then this Court, to rule on inverse condemnation. The majority refused to reach the question because there was no final judgment: The California court had not yet found, as a matter of fact, that a "taking" had occurred. In his dissenting opinion, Mr. Justice Brennan argued that such a factual finding was precluded by a legal ruling, 67 L.Ed.2d at 565:

> . . . the [California court] held that the city's exercise of its police power, however arbitrary or excessive, could not *as a matter of federal constitutional law* constitute a "taking" under the Fifth and Fourteenth Amendments. . . . [emphasis in original]

What Justices Brennan, Stewart, Marshall and Powell believed had happened in *San Diego* is exactly what happened in *Amdur*. Petitioner's Complaint alleged that his property values, and ability to earn a reasonable return on his investment, had been destroyed by zoning

ordinances which met established criteria for arbitrariness and capriciousness — i.e., that an impermissibly-enacted zoning ordinance denied him economically viable use of his land. The Court of Appeals for the Seventh Circuit ruled, on the basis of *Agins,* that such allegations did not as a matter of law state a Fifth Amendment claim for relief. The issue was not compensability. The Court of Appeals swept away a constitutional barrier between police power and property rights and held that every zoning regulation was as a matter of law invulnerable to a Fifth Amendment challenge.

That the Court of Appeals misconstrued *Agins* is apparent from dissent in *San Diego* (in which Mr. Justice Powell, the author of *Agins,* joined), 67 L.Ed.2d at 570:

> . . . the California courts have held that a city's exercise of its police power, however arbitrary or excessive, cannot as a matter of federal constitutional law constitute a "taking" within the meaning of the Fifth Amendment. This holding flatly contradicts clear precedents of this Court. For example, in last Term's *Agins* v. *City of Tiburon,* 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138 (1980), the Court noted that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or [if it] denies an owner economically viable use of his land."

The *Amdur* decision cannot be explained, as the majority explained *San Diego,* as a failure to decide a factual question. In *Amdur*, the Court of Appeals for the Seventh Circuit ruled, on the pleadings, that a taking (or, for that matter, an "overzealous use of the police power") had not occurred as a matter of law. The decision threatens to erode a heretofore-existing constitutional

barrier between property rights and arbitrary and capricious regulatory legislation. Granting Petitioner's Petition for Writ of Certiorari will give this Court the opportunity to clarify a present uncertainty in federal constitutional law.

Respectfully submitted,

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